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THE NAVAJO NATION

Summary of Navajo Nation Position Paper on The Requirement of Navajo Nation Consent as a Condition For Granting Rights-of-Way Across Navajo Land

The Navajo Nation signed two treaties that form the basis for the federal/Navajo relationship. A fundamental right guaranteed by those treaties is the right to exclude or to condition the entry of nonmembers engaging in commerce within the Navajo Reservation.ⁱ

Since 1924, the Navajo Nation has been asked by energy companies, aided by the federal government, to accommodate the energy needs of the American Southwest. The Navajo Nation provides leases and rights-of-way to numerous energy extraction, production and transmission companies, and, pursuant to federal regulations, requires appropriate compensation and other terms in exchange for those rights.

In the past several years, the Navajo Nation has negotiated agreements with and granted rights-of-way to various natural gas pipelines (Transwestern Pipeline Company [Transwestern], Enterprise Fuel Services, and other companies) on terms that the Nation deems fair and equitable. However, one such company, El Paso Natural Gas Company ("EPNG"), which currently operates on Navajo Nation trust lands 900 miles of pipeline and 630 acres of related facilities, has refused to accept comparable terms. EPNG operated in trespass after October 17, 2005, until the Navajo nation granted a right of temporary use through December 31, 2006.

The United States has moved from policies of exploitation of tribal resourcesⁱⁱ to a policy of government-to-government respect, requiring the consent of tribal governments to any conveyance of tribal resources. Adherence to the tribal consent principle comports with fundamental American values and the modern federal policy of respect for tribal decision making.ⁱⁱⁱ Nonetheless, EPNG has asked the Navajo Nation's trustee, the Secretary of the Interior, to violate her own regulations and her trust obligations by granting EPNG's rights-of-way without Navajo Nation consent. On September 29, 2005, EPNG submitted to the Solicitor of the Department of the Interior a legal brief that purports to construe the treaties, the 1948 Indian Right-of-Way Act (the "1948 Act"), and the Natural Gas Act (the "NGA") in a way that would permit such a result.

In its brief, EPNG claims that the long-standing regulations that require tribal consent to rights-of-way crossing Indian land are unlawful, and that the 1983 Transwestern decision of the Department that applied the consent requirement to pipeline rights-of-way on Navajo Lands was wrongly decided. EPNG further argues that in the 1868 Treaty, the Navajo Nation has consented to unlimited renewals of EPNG's rights-of-way across Navajo lands. In addition, EPNG claims that failure by the Secretary to grant its application would be tantamount to requiring an unauthorized abandonment of the pipeline facilities in conflict with FERC's jurisdiction under the Natural Gas Act. Finally, El Paso argues that the imposition of unreasonable right-of-way terms by the Nation would be an unlawful exercise of authority over non-Indians.

On November 18, 2005, the Navajo Nation provided a comprehensive refutation of EPNG's contentions in the "Navajo Nation Position Paper on the Requirement of Navajo Nation Consent as a Condition for Granting Rights-of-Way across Navajo Land," together with an Appendix of supporting documents of over 300 pages. Because we understand that EPNG has also sought support in Congress for its proposed unlawful solution to the fabricated crisis of

EPNG's own making, the Navajo Nation is providing this brief summary of its position.

First, for over a half century, EPNG has repeatedly agreed to limited terms of years for its rights-of-way and has always recognized the need to obtain Navajo Nation consent for its use of Navajo lands.^{iv} EPNG has agreed that its improvements would become Navajo Nation property upon the expiration of many of those agreements. The Navajo Nation has insisted on such terms as a principal way to govern economic activity within Navajo Indian country in accordance with its Treaty rights. The Navajo Nation has relied on those agreements and granted valuable consideration for them. EPNG is barred by contract and by its actions from now contending otherwise, and Congress should resist EPNG's efforts to impair this contractual regime through new and unnecessary legislation.

Second, the Department of the Interior has, by regulations in effect without interruption since 1951, construed the 1948 Act as requiring the consent of all tribes to any grant of a right-of-way by the Secretary, the federal courts have upheld that construction, and Congress has ratified it.^v Thus, any grant of a right-of-way over Navajo lands without Navajo consent would violate Interior's own regulations and constitute a compensable breach of trust.^{vi} The reference in the 1948 Act to tribes organized under the Indian Reorganization Act "was merely to prevent implied supersession of the Indian Reorganization Act and the Oklahoma Indian Welfare Act,"^{vii} not to limit the consent requirement to those tribes.

EPNG's brief completely misconstrues the Navajo treaties. No court or agency has accepted EPNG's spin on the treaty provision that provides that the Navajo Nation will not oppose the construction of works of utility crossing the reservation. Indeed, EPNG's interpretation of this language, which is also contained in treaties with other tribes, has been squarely rejected by the Secretary of the Interior and the federal courts.^{viii} Similarly, EPNG's argument that adherence to the consent requirement would abrogate the 1868 Treaty is misplaced, since the treaty abrogation doctrine is intended to protect the tribes, not non-Indians, from a diminution of rights guaranteed under treaties. Indeed, because a treaty is essentially a contract between two governments, EPNG has no standing to complain of treaty abrogation.^{ix} The Navajo Nation relies on its fundamental right under the treaties to exclude or condition the entry of those seeking to do business on Navajo Nation lands. That right was upheld in the very case that EPNG bases most of its arguments to the contrary.^x

EPNG's related claims that respect for the consent principle would be inconsistent with its FERC certificate of public convenience and necessity or would require EPNG to "abandon" its line in violation of the NGA are incorrect. Under the NGA, abandonment does not result automatically if a pipeline's right-of-way easement expires. Rather, abandonment occurs only where there is a permanent termination of service or removal of certificated facilities.^{xi} Nor would a lawsuit by the Navajo Nation seeking damages for trespass be considered an attack on EPNG's certificate, since the Navajo Nation has no intention of requiring any curtailment of interstate transportation service to EPNG's customers.^{xii}

Under the Constitution, treaties are the supreme law of the land. EPNG requests the United States to abrogate one of the most fundamental treaty rights of the Navajo Nation so that EPNG can obtain a competitive advantage over other pipeline companies, increase its profits, and save a typical ratepayer less than one percent of a monthly utility bill – all to deprive the Navajo Nation of revenue when 90% of Navajos lack any natural gas service, 54% lack any electric service at all, and 70% lack any running water. If experienced anywhere else in the United States, these conditions would constitute a national emergency meriting full deployment of appropriate federal resources, not an attempt to impoverish the area further.

In addition, adoption of the regime advocated by EPNG would be inconsistent with the established federal policy of respect for tribal sovereignty and would have far-reaching adverse impacts on the government-to-government relationship. The fundamental right of the Navajo people to plan and regulate community development would be frustrated. The elimination of or disregard for the tribal consent requirement for rights-of-way advocated by EPNG would also affect other tribes and apply to rights-of-way for any company that provides public services or require energy corridors.

The Navajo Nation urges all federal officials and members of Congress to reject EPNG's unlawful attempts to end-run the long-established process for obtaining rights-of-way across Navajo lands. The crisis posited by EPNG is a false one, created by its own obstinance. The Navajo Nation urges our representatives in Congress and the

Administration to encourage EPNG to reach reasonable terms with the Nation – terms comparable to those accepted by other pipeline companies – by a date certain, and to get back to business. The Navajo Nation remains willing to agree to such terms.

ENDNOTES

i E.g., Babbitt Ford, Inc. v. Navajo Indian Tribe, 710 F.2d 587, 592 (9th Cir. 1983), cert. denied, 466 U.S. 926 (1984).

ii The Nation has been called an energy colony of the United States. U.S. Comm’n on Civil Rights, The Navajo Nation: An American Colony (1975).

iii “Disposal of Rights in Indian Lands without Tribal Consent,” H.R. Rep. No. 91-78, 91st Cong., 1st Sess. (1969) (“Report”) at 19; Richard B. Collins, Indian Consent to American Government, 31 Ariz. L. Rev. 365 (1989).

iv During its first 25 years of operation on the Navajo Nation, EPNG constructed an extensive system of natural gas gathering and transmission pipelines (and associated compressor stations), which was covered by numerous rights-of-way agreements. The multiple agreements created administrative burdens for both sides, and to ease these burdens, the parties entered into an agreement dated January 29, 1985, which consolidated all existing rights-of-way into a single rights-of-way grant with a single termination date. The Nation conditioned its consent to the consolidated rights-of-way upon provisions that require disputes to be handled in the Navajo Nation courts, reserve Navajo Nation control over other uses of the lands subject to the easements, require EPNG to comply with Navajo law, and require EPNG to leave peaceably when its rights-of-way expire.

v See, e.g., 25 C.F.R. § 256.3 (1952); 25 C.F.R. § 161.3 (1980); 25 C.F.R. § 169.3(a) (2004); Kay v. Federal Communications Comm’n, 443 F.2d 638, 647-48 (D.C. Cir. 1970) (“a consistent administrative interpretation of a statute, shown clearly to have been brought to the attention of Congress and not changed by it, is almost conclusive evidence that the interpretation has congressional approval”); Report at 20; Southern Pac. Transp. Co. v. Watt, 700 F.2d 550 (9th Cir. 1983), cert. denied, 464 U.S. 960 (1984).

vi Coast Indian Community v. United States, 550 F.2d 639 (Ct. Cl. 1977); see United States v. Mitchell, 463 U.S. 206, 223 (1983) (discussing fiduciary duties under 1948 Act).

vii Report at 9, citing S. Rep. No. 823, 80th Cong., 2d Sess. (1948).

viii Placed in context, it becomes clear that this portion of the Treaty concerned the cessation of armed hostilities on the part of the Tribe. Kerr-McGee Corp. v. Navajo Tribe of Indians, 731 F.2d 597, 600 & n.2 (9th Cir. 1984), aff’d 471 U.S. 195 (1985); accord Bennett County, South Dakota v. United States, 394 F.2d 8, 15-16 (8th Cir. 1968); United States v. 2005.32 Acres of Land, 160 F. Supp. 193 (D.S.D. 1958) (construing identical provision of Sioux treaty); Transwestern Pipeline Co., 12 IBIA 49 at 58-59 (1983).

ix See United States v. Chaparro-Alcantara, 226 F.3d 616, 620-21 (7th Cir.), cert. denied, 531 U.S. 1026 (2000).

x In Montana v. United States, 450 U.S. 544 (1982), the Court did place limits on a tribe’s authority to govern people who were lawfully using non-Indian fee lands within the tribal territory, but the Court upheld in no uncertain terms the tribe’s right to deny or condition the entry of nonmembers seeking to use tribal lands. Id. at 557. The Montana rule also applies to some holders of valid rights-of-way, but not to trespassers or those seeking new rights to tribal trust lands, as in EPNG’s case. Those entities are subject to the fundamental right condition the entry of nonmembers seeking to do business within the Reservation, and an Indian nation “needs no grant of authority from the federal government in order to exercise this power.” Ortiz-Barraza v. United States, 512 F.2d 1176, 1179 (9th Cir. 1975).

xi Reynolds Metals Co. v. FPC, 534 F.2d 379 (D.C. Cir. 1976).

ii See Skokomish Indian Tribe v. United States, 410 F.2d 506, 512 n.4 (9th Cir. 2005) (en banc), pet. for cert. filed, 74 U.S.L.W. 3233 (U.S. Oct. 3, 2005).